No 08-325

In the Supreme Court of the United States

MANTA MANAGEMENT CORPORATION,

Petitioner,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

SUMMARY OF ARGUMENT

Petitioner Manta Management Corporation ("Manta") opened an "adult" business in the City of San Bernardino ("City") in direct violation of City zoning ordinances. The City applied for and obtained a preliminary injunction enforcing the zoning restrictions contained in the ordinances. Later, a different judge of the trial court found the zoning restrictions were invalid for reasons having to do with the adequacy of findings in the ordinances and the acreage available to adult businesses. The City appealed and obtained a writ of supersedeas from the California Court of Appeal, but that court later affirmed the trial court judgment solely on the ground that the ordinances lacked adequate findings.

Manta then sued for damages under 42 U.S.C. § 1983 ("section 1983") and state law for the time it was subject to the preliminary injunction and the supersedeas stay. All state law claims were dismissed. The trial court ruled that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas, were violations of the federal Constitution which gave rise to damages under section 1983. The jury awarded $1.4 million dollars in damages.

The California Supreme Court reversed the judgment, ruling that the decisions of the trial court and court of appeal to grant the preliminary injunction and writ of supersedeas were

superseding intervening acts that insulated the City from liability under section 1983 unless the City materially misled the courts when they issued the injunction and writ. The court remanded for a trial on whether the courts were materially misled. Manta now petitions for certiorari to review the California Supreme Court decision.

The petition should be denied. In summary:

1. Review by this Court, even if warranted, would be premature until the trial court makes the factual determinations directed by the California Supreme Court in its remand. Depending on the outcome of those determinations, the principal issue on which Manta seeks review may become moot. Alternatively, additional issues may arise that cannot be resolved until the factual determinations on remand have been made.

2. Contrary to Manta's assertion, the California Supreme Court's application of superseding causation in this case is not inconsistent with this Court's decision in Malley v. Briggs, 475 U.S. 335 (1986). Manta's claim that Malley supports the proposition that superseding causation does not apply in section 1983 cases is based wholly on dictum in a footnote. Moreover, even that dictum has not been extended beyond the facts of Malley, which unlike this case involved a non-adversarial judicial determination. Numerous post-Malley Circuit court decisions have applied superseding causation in section 1983 cases, and no decision has interpreted Malley to preclude the application of superseding causation in such

cases, as Manta advocates.

3. Again contrary to Manta's assertion, there is no conflict between the decision of the California Supreme Court and the Tennessee decision cited in the petition. In fact, the Tennessee decision never addressed the proposition for which Manta cites it, i.e., that a municipality is strictly liable under section 1983 if it obtains an injunction to enforce an unconstitutional ordinance, without regard to whether it misled the court that issued the injunction.

4. There also is no conflict between the decision of the California Supreme Court and the decision of this Court in City of Littleton v. Z. J. Gifts 4-U, L.L.C., 541 U.S. 774 (2004). City of Littleton suggested a federal remedy against state judicial procedures if they prove too slow, not against the litigants in the state court proceedings.

5. Federal law holds that the exclusive remedy for an improper injunction is to recover on the injunction bond if there is one. Manta contends that merely asking the court to require a bond gives rise to unlimited damages if the court fails to require a bond and the injunction is later held improper. Settled law rejects that contention. Moreover, Manta never submitted any evidence that could have supported an injunction bond condition, and it failed to raise this issue on appeal.

II

STATEMENT OF FACTS AND OF THE CASE

A. CIVIL NUISANCE ABATEMENT PROCEEDINGS

The City of San Bernardino, like most cities, has zoning ordinances that restrict where "adult" businesses may operate. Manta opened the "Flesh Club" on Hospitality Lane in the City of San Bernardino in a zone that does not allow any "adult" businesses. Manta originally opened a comedy club in 1994 and obtained the necessary permits. As Manta later admitted, this was a subterfuge, because Manta intended from the outset to convert to a nude "adult cabaret" shortly after opening, in direct violation of the City's ordinances.

The City filed a civil nuisance abatement action to enforce its zoning ordinances. Two different judges of the trial court issued a temporary restraining order and then a preliminary injunction prohibiting violation of the ordinances. The TRO and preliminary injunction did not prevent operation; they simply required Manta's employees to keep their clothing on pending a trial.

Approximately a year later, a third judge heard a trial and concluded that the City's ordinances were invalid, for two separate reasons:

1. Although a city can regulate "adult" businesses based on the "secondary effects" those

businesses cause, and can rely on studies conducted by other cities to prove secondary effects, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1981), there were insufficient findings in the ordinances that the secondary effects in San Bernardino would be similar to those in other cities. (In fact, the City had presented evidence at the preliminary injunction stage to support such findings, but did not present the evidence again at trial.)

2. The trial court ruled that when the restrictions on zones and on minimum distances from uses such as houses and schools were considered, the City's zoning ordinances did not allow sufficient sites for adult businesses to operate. Although there was no evidence of *any* competition for any of the available sites, the trial court ruled that 27 sites for adult businesses spread over 80 acres were insufficient.

The City appealed and applied for a writ of supersedeas, which the Court of Appeal issued. Again, the writ of supersedeas did not prevent Manta from operating, but only required it to keep its "dancers" clothed pending the resolution of the appeal. The Court of Appeal took two years to decide the case, and ultimately affirmed on the first ground only: lack of adequate factual findings in the ordinances and failure of the City to present again at trial the evidence of secondary effects it had presented at the preliminary injunction stage.

B. LIABILITY AND DAMAGES PROCEEDINGS

Federal Court Proceedings and Cross-complaint

Manta originally filed an action in federal court seeking an injunction against the City's ordinances. When the federal action was dismissed on abstention grounds, Manta filed a cross-complaint in the City's nuisance abatement action, seeking an injunction against the City's ordinances and damages based on both federal and state law.

All State Law Causes of Action Were Dismissed

The trial court granted summary judgment on all California law causes of action. The case was tried solely on a single federal law cause of action.

The Ordinances Caused No Damages

At the time it granted summary adjudication of the state law causes of action, the trial court found it undisputed that the City's ordinances themselves caused Manta no damages, and the only potential claims for damages were based on the preliminary injunction and the writ of supersedeas pending appeal.

Manta's Theory of Liability

At the start of trial the court directed Manta to file a first amended cross-complaint which succinctly stated its claims. Manta's single claim was based solely on federal law. The only federal Constitutional rights Manta cited were the First and Fourteenth Amendments. The only relevance of the Fourteenth Amendment was to make the First Amendment applicable to the states; Manta did not allege any independent violation of the

Fourteenth Amendment. Damages were claimed only for the period of time Manta was restricted by the court orders from operating as an "adult cabaret" and the time it took to get back in operation after the court proceedings were concluded. Manta's case therefore rested on the premise that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas pending appeal, violated the First Amendment.

Liability proceedings

The parties agreed to try the liability issues to the court. The trial court ruled that the act of requesting the preliminary injunction, and the act of requesting the stay pending appeal, violated the federal Constitution and were grounds for damages.

Damages proceedings

The jury was told that liability was established, and was only asked to determine damages. It found that approximately 75% of Manta's profits were derived from prostitution, but awarded $1,400,000 in damages.

C. CALIFORNIA SUPREME COURT OPINION

After unsuccessfully appealing the trial court judgment to the California Court of Appeal, the City sought, and obtained, discretionary review in the California Supreme Court. That court stated the issue for decision as follows:

[T]he ordinance caused Manta no harm

because Manta did not abide by it. Manta suffered no monetary damages until the trial court enjoined its operating an adult cabaret where its comedy club had been located. The issue before us is whether the city's *act of seeking an injunction* to enforce the ordinance dealing with the location of adult businesses and its subsequent *act of filing a petition for writ of supersedeas* to obtain a stay pending appeal "caused" the harm suffered by Manta to the extent that the city is liable for damages Manta incurred during the 53 months the injunction and the stay were in place. Manta Management, Inc. v. City of San Bernardino, 43 Cal.4th 400, 407 (2008), emphasis in original.

In a unanimous opinion, the court concluded:

We conclude, consistent with analogous federal and state court decisions, that the courts' intervening exercise of independent judgment in issuing the preliminary injunction and stay, though the former was dissolved and the latter was lifted after the ordinance was declared unconstitutional, breaks the chain of causation for purposes of section 1983 liability in the absence of evidence that the city materially misled or pressured the judges who were expected to exercise independent judgment. In this case, where the parties dispute whether material misrepresentations were made to the judges who issued the preliminary injunction and the stay, we reverse the judgment of the Court of

Appeal and remand the case for further proceedings on that factual issue. 43 Cal.4th at 403.

III

REVIEW BY THIS COURT IS PREMATURE UNTIL THE TRIAL COURT MAKES THE FACTUAL DETERMINATIONS DIRECTED BY THE CALIFORNIA SUPREME COURT

Rule 10 of the rules of this Court states in part: "A petition for a writ of certiorari will be granted only for compelling reasons." No such compelling reason exists in this case, because consideration by this Court of the principal issue on which Manta seeks review is premature at this juncture.

Manta asks this Court to decide whether the California Supreme Court correctly held that the principle of superseding causation could absolve the City from liability under section 1983 for enforcing an ordinance that was later held to be unconstitutional. The California Supreme Court concluded that since the City enforced the ordinance by obtaining a preliminary injunction and writ of supersedeas, the independent decisions of the courts to issue the injunction and writ insulated the City from liability unless the City materially misled the courts.

The court made it clear, however, that it could not decide at this point whether in fact the principle of superseding causation should apply, because factual disputes existed as to what misstatements the City may have made to the

courts and whether the misstatements were material to the decisions to issue the injunction and writ. Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 413, 181 P.3d 159, 168 (2008). Accordingly, the court remanded the matter "to allow the trial court to resolve any relevant factual issues and to apply the principles of superseding intervening causation in the first instance." Ibid.

The trial court has not yet resolved any factual issues, nor has it determined how, if at all, the principle of superseding causation applies to this case. Depending on how those matters are resolved, the issue on which Manta seeks review could become moot. If the trial court determined that the City made material misstatements that prevented the exercise of the courts' independent discretion, then under the California Supreme Court decision, superseding causation would not apply and the issue on which Manta seeks review – whether superseding causation applies in a section 1983 action – would no longer be presented.

Moreover, the determination of materiality in this context involves subsidiary issues that were not resolved by the California Supreme Court, e.g., the proper standard for proving materiality and whether the issue can be determined by the court as a matter of law or should be submitted to the fact finder. The California Supreme Court plainly contemplated that these and similar subsidiary issues would be considered by the trial court in the first instance. There is no compelling reason this

Court should intervene in that process at this time.

This Court has recognized that while the pendency of further trial court proceedings does not necessarily preclude certiorari jurisdiction, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 95 S.Ct. 1029 (1975), "[t]he presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary." Hammerstein v. Superior Court of California, 341 U.S. 491, 492, 71 S.Ct. 820 (1951). For the reasons stated, the Court should decline to exercise its discretion to review this case at this premature stage.

IV

THE CALIFORNIA SUPREME COURT'S APPLICATION OF SUPERSEDING CAUSATION TO THIS CASE IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN MALLEY V. BRIGGS

This Court repeatedly has stated that actions brought under § 1983 are governed by common law tort principles. Heck v. Humphrey, 512 U.S. 477, 483 (1994) (" We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.' [Citation] Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the

inquiry under § 1983 as well.' [Citation]"); Kalina v. Fletcher, 522 U.S. 118, 123 (1997) ("Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment. [Citations]"); United States v. Texas, 507 U.S. 529, 534 (1993) (" statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' [Citation] . . .' In order to abrogate a common-law principle, the statute must speak directly' to the question addressed by the common law."); Inyo County v. Paiute-Shoshone Indians of Bishop County, 538 U.S. 701, 709 (2003) (in enacting § 1983, "Congress did not intend to override well-established immunities or defenses under the common law"); Meyer v. Holley, 537 U.S. 280, 285 (2003) ("when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules").

At the time § 1983 was adopted, superseding, intervening cause was an established part of the common law of torts. See, e.g., Scheffer v. R. R. Co., 105 U.S. 249, 252 (1881); Milwaukee & S.P.R. Co. v. Kellogg, 94 U.S. 469, 474 (1876); Pike v. Grand Trunk R. Co., 39 F. 255, 257 (Circuit Court N.H. 1889); Estill v. New York, L.E. & W. Co., 41 F. 849, 846 (Circuit Court Mo. 1888); The Ontario, 37 F. 220, 223 (E.D. Mich. 1889).

Manta contends this Court rejected the

application of superseding, intervening cause to section 1983 cases in a footnote in Malley v. Briggs, 475 U.S. 335 (1986). However, the actual holding in Malley did not concern superseding causation. In Malley, this Court considered whether absolute or qualified immunity should apply to a police officer who files a warrant application that is not supported by probable cause. The court held that qualified immunity applies, unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. at 345-356.

Then, in the footnote upon which Manta places such great significance, the Court stated:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of §1983. As we stated in Monroe v. Pape [citation], §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing the same causal link. 475 U.S. at 345, n. 7.

As is apparent from the Malley Court's observation that the officer had "not pressed" the superseding causation argument, the Court's discussion of whether the principle should apply in section 1983 was dictum. Manta, in fact, acknowledges that the discussion was dictum, Petition at 6, yet it then repeatedly refers to the dictum as the "decision" of the Court, and goes on to assert that the California Supreme Court's application of superseding causation to this case is contrary to that "decision." Petition at 7, 15-18. Even more creatively, in its statement of questions presented, Manta characterizes the dictum in Malley as "the teaching of this Court," and implies that the California Supreme Court committed legal error by not "following" the teaching. Petition at i.

Post-Malley Circuit court cases have recognized the Malley footnote for what it is – non-authoritative dictum that should not be interpreted to preclude the application of superseding causation to section 1983 cases. In Egervary v. Young (3rd Cir. 2004) 366 F.3d 238, 247-248 (3rd Cir. 2004), which the California Supreme Court cited, the Third Circuit pointed out that the dictum in the Malley footnote addressed an issue on which this Court had not granted certiorari, and that under the common law referenced in the footnote, there is potential liability for the acts of an independent decisionmaker such as a court only if the decisionmaker has been misled:

> To the extent that the common law recognized the causal link between a

> complaint and the ensuing arrest, it was in the situation where "misdirection" by omission or commission perpetuated the original wrongful behavior. [Citation] If, however, there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention prevented the original actor from being liable for the harm. [Citations] Thus, the cryptic reference to the common law in Malley's footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive.

That is, of course, exactly what the California Supreme Court held in this case – an intervening judicial decision is a superseding cause *unless* the party who procures the decision misrepresents material facts to the issuing court.

Other post Malley decisions have noted that in Malley the judicial determination – issuance of an arrest warrant – occurred in a non-adversary setting, and have concluded that Malley is no bar to the application of superseding causation where, as here, the judicial determinations at issue occur in an adversary setting where procedural safeguards exist to protect against erroneous decisions. In Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986), for example, the Seventh Circuit afforded qualified immunity to a medical examiner in a section 1983 action alleging prosecution without probable cause. The court held that the grand jury's return of an indictment

established that there was probable cause for the prosecution. It further stated that Malley did not undermine its conclusion, because "[t]he procedural protections in grand jury hearings, particularly the involvement of a group of jurors, are much greater than those available when arrest warrants are issued." *Id.* at 892, n. 10; see also Burns v. County of King, 883 F.2d 819, 822-23 (9th Cir. 198?) (Malley did not preclude immunity for social worker who supplied information to court not as a "complaining witness" as in Malley, but "in adversarial post-trial proceedings").

In fact, the California Supreme Court cited no less than eight post-Malley decisions of the United States Courts of Appeals, and two post-Malley state court decisions, in support of its conclusion that a court's adjudication of a matter is a superseding causation that breaks the chain of causation between the conduct of the defendant in seeking judicial relief and any resulting damage to the plaintiff. Manta Management Corp. v. City of San Bernardino, 43 Cal.4th at 409-12, 181 P.3d at 165-67. Yet Manta does not discuss, or even acknowledge, a single one of these decisions.

Although there are some disagreements among the lower courts about how superseding, intervening cause applies under specific fact situations, lower courts all follow some version of it. None of the lower courts adopts Manta's argument that the principle does not apply at all to actions based on federal law. Rather, federal courts routinely apply common law rules of causation, including the rule of superseding cause

stated in Restatement of Torts (Second) § 440-441. Most relevant for purposes of this case, superseding cause has been applied to cases based on:

- Court injunctions and rulings in criminal cases. The cases hold that an independent decision of the court cuts of liability unless the court was misled. Galen v. County of Los Angeles 477 F.3d 652, 663 (9th Cir. 2007) (order setting bail); Townes v. City of New York 176 F.3d 138 (2nd Cir. 1999), cert. den. 528 U.S. 964 (1999) (order denying a motion to suppress); Wray v. City of New York, 490 F.3d 189 (2nd Cir. 2007) (same); Egervery v. Young, 366 F.3d 238, 248 (3rd Cir. 2004), cert. den. 543 U.S. 1049 (2005) (order granting an ex parte application for an order seizing a child in a custody dispute); Murray v. Earle, 405 F.3d 278 (5th Cir. 2005), cert. den. 546 U.S. 1033 (2005) (decision to admit a confession); Mayor of Lansing v. KKK 564 N.W.2d 177, 180-183 (Mich.App. 1997), cert. den. 524 U.S. 904 (1998) (preliminary injunction). Cf. Dominguez v. Hendley ___ F.3d ___, 2008 U.S.App.Lexis 20577, * 6-8 (7th Cir. 2008) (causation was shown because the court was misled).

- The decision of a prosecutor to file criminal charges. Again, the cases hold that the independent decision cuts off liability unless the prosecutor was misled. Newman v. County of Orange, 457 F.3d 991, 993 (9th Cir. 2006), cert. den. 127 S.Ct. 1383 (2007); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. den. 459 U.S.

829 (1982)[1]; Blankenhorn v. City of Orange, 485 F.3d 463 (9th Cir. 2007); Barts v. Joyner, 865 F.2d 1187, 1195-1196 (11th Cir. 1989) (acts of prosecutor, judge and jury); Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007).

These cases hold that an independent decision of judge or a prosecutor cuts off the chain of causation unless the judge or prosecutor was materially misled at the time of the decision. The California Supreme Court properly followed these cases. The decision of the California Supreme Court is fully consistent with Malley and the cases which follow it. Hence, Manta's claim that the California Supreme Court's application of the superseding causation doctrine in this case was "inconsistent" with Malley is illusory.

V

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CALIFORNIA SUPREME COURT AND THE TENNESSEE SUPREME COURT DECISION ON WHICH MANTA RELIES

Manta attempts to manufacture a conflict between the decision of the California Supreme Court in this case and the decision of the Tennessee Supreme Court in City of Knoxville v. Entertainment Resources, 166 S.W.3d 650 (Tenn. 2005), cert. den. 545 U.S. 1061 (2005). That case,

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[1] This Court cited Smiddy with approval in Hartman v. Moore, 547 U.S. 250, 263 (2006).

which was not cited prior to the present petition, never even mentioned the principle of superseding causation. In City of Knoxville, the trial court granted a preliminary injunction enforcing an ordinance against an "adult" business. The Tennessee Supreme Court found the ordinance invalid as unduly vague and remanded as to damages. The Court never once mentioned liability or causation.

The unpublished court of appeals opinion referenced in the Tennessee Supreme Court opinion only addressed two narrow issues because that was all the city raised: "The City asserts that Entertainment Resources damage claims are too speculative in nature to support a judgment and that the company failed to mitigate its damages after entry of the temporary injunction.'" City of Knoxville v. Entertainment Resources, 2003 Tenn.App.Lexis 821, * 22 (Tenn. App. 2003). Again, the court addressed no issues concerning liability or causation.

It must be assumed that if the issue of superseding causation had been raised in either of the Tennessee cases, the court would have addressed it. Accordingly, the only reasonable inference is that the issue was not raised in either court. That being the case, Manta's assertion of a conflict between the Tennessee decisions and the decision of the California Supreme Court is wholly unsupported and cannot provide a basis for review by this Court.

VI

MANTA COMPLETELY MISREADS THIS COURT'S DECISION IN CITY OF LITTLETON

Manta contends this Court's decision in City of Littleton v. Z. J. Gifts 4-U, L.L.C., 541 U.S. 774 (2004), addressed damages. Manta completely misreads the Court's opinion. The issue actually addressed in City of Littleton was whether a city had to write procedures for judicial review of "adult" business regulations into its ordinances, or whether reliance on state court procedures is sufficient. This Court held that state court procedures are sufficient, especially since state courts will be sensitive to the First Amendment issues. The sentence Manta quotes actually states that federal courts can correct delays in state court procedures; there is no suggestion that a litigant should be subject to damages if the state court delays.

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.
>
> First, ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm.

Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. [Citation]

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." [Citations] There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev Stat § 1979, 42 U.S.C. § 1983. 541 U.S. at 781-782.

VII

THERE WAS NO WRONGFUL ACT WHICH COULD SUPPORT DAMAGES

Although the California Supreme Court decided the case on causation grounds, a prior question is whether there was a violation of the federal Constitution at all. Manta raises that issue as a question presented, but then completely ignores that question in the body of the petition.

A. REQUESTING A COURT TO ISSUE AN ORDER IS NOT A WRONGFUL ACT

It obviously does not violate the federal Constitution to file litigation which results in a judgment in the plaintiff's favor. Rather, except to the very limited extent that federal law recognizes a malicious prosecution claim or a claim based on the violation of a specific federal constitutional right, even filing and pursuing an *unsuccessful* lawsuit is not a wrongful act under federal law at all. See Hartman v. Moore, 547 U.S. 250 (2006) (part of a plaintiff's prima facie case is proof of lack of probable cause); Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003), cert. den. 543 U.S. 808 (2004) (summarizing federal cases concerning malicious prosecution).

Manta's position therefore boils down to a contention that the First Amendment provides it with a right not to be sued unsuccessfully, or alternatively, a right not to have a court grant a preliminary injunction unless the preliminary injunction is sustained at trial. No published case supports that contention, and several analogous cases reject it. Laxalt v. McClatchy, 622 F.Supp. 737 (D. Arizona 1985) (the First Amendment provides a defense to the libel suit, but does not provide a right not to be sued for libel or a right to damages based on being sued for libel); Jungherr v. San Francisco U.S.D. Board of Education, 923 F.2d 743 (9th Cir. 1991), cert. den. 502 U.S. 808 (1991) (the First Amendment provides a defense to a defamation action, but provides no right not to be sued for defamation); Gritchen v. Collier, 254 F.3d

807, 811 (9th Cir. 2001) ("there is no constitutional right to be free from defending speech in court").

Similarly, the First Amendment provided Manta with a defense to the civil nuisance abatement action. However, it provided no right not to be sued and no right not to have a motion requesting a preliminary injunction or stay pending appeal filed or granted.

Stated otherwise, it is not a wrongful act, and not a violation of the First Amendment, for a public entity to request a trial court to issue a preliminary injunction or to request an appellate court to issue a stay.

B. THE FIRST AMENDMENT PRECLUDES LIABILITY FOR LITIGATION SUPPORTED BY PROBABLE CAUSE

One right protected by the First Amendment is the right to file and prosecute lawsuits in court to resolve disputes. Although this right is usually invoked against the government, cities and other local government entities also have a First Amendment right to resolve disputes in court. Herr v. Pequea Township, 274 F.3d 109, 119 (3rd Cir. 2001)[2]; Mariana v. Fisher, 338 F.3d 189, 199 (3rd Cir. 2003), cert. den. 540 U.S. 1179 (2004); Sanghvi v.

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[2] An unrelated aspect of the case – the proper standard for asserting a substantive due process claim – was overruled in UA Theater Circuit v. Township of Warrington, 316 F.3d 392, 400 (3rd Cir. 2003).

City of Claremont, 328 F.3d 532, 543 (9th Cir. 2003), cert. den. 540 U.S. 1075 (2003); County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1387, 1390 (E.D. N. Y. 1989)[3]; Schneck v. Saucon Valley School District, 340 F.Supp.2d 558, 573 (E.D. Penn. 2004).

There can be no liability based on the exercise of the First Amendment right to resolve disputes in court unless the litigant acts without probable cause or in bad faith. Professional Real Estate Investors v. Columbia Picture Industries, 508 U.S. 49, 56 (1993); Herr, 274 F.3d at 115-116, and cases cited therein ("While the right to petition conferred by the First and Fourteenth Amendments does not provide an absolute immunity from liability for actions based on petitioning activity [citation], the Supreme Court has held that such liability cannot be imposed in the absence of a finding that the position taken lacked any reasonable basis"); Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1273 (6th Cir. 1989); IGEN International, Inc. v. Roche Diagnostics GMHM, 335 F.3d 303, 310 (4th Cir. 2004); Porous Metals Corp. v. Pall Corp., 186 F.3d 1077, 1080, n. 4 (8th Cir. 1999); Hufsmith v. Weaver, 817 F.2d 455, 458-460 (8th Cir. 1987).

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[3] Affirmed in part and reversed in part in an opinion which did not address this issue. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1990).

C. THE CALIFORNIA SUPREME COURT REMANDED FOR A HEARING ON WHETHER THE COURTS WERE MISLED AT THE TIME THEY ISSUED THEIR ORDERS

There is an exception to these rules if malicious prosecution or bad faith can be shown. Manta never alleged either one. Nevertheless, the California Supreme remanded for a trial on whether the trial court or court of appeal were misled at the time the preliminary injunction and stay pending appeal were issued, so Manta has a full right to litigate these issues.

VIII

UNDER FEDERAL LAW, THERE IS NO LIABILITY FOR DAMAGES BASED ON A PRELIMINARY INJUNCTION OR STAY PENDING APPEAL UNLESS MALICIOUS PROSECUTION OR BAD FAITH IS PROVEN OR AN INJUNCTION BOND IS REQUIRED

Although Manta does not list it is an issue for review, its petition asks this Court to address whether the City should have been required to post a bond. Since Manta never appealed the decision not to impose a bond condition, that question is not properly before this Court. However, federal injunction bond law is yet another reason why the City is not liable and Manta's petition is without merit.

A. ADDITIONAL FACTS RELEVANT TO THIS ISSUE

At the time the TRO and preliminary injunction were granted, Manta still had a lawsuit pending in

federal court. Its state court opposition to the TRO and preliminary injunction expressly did not raise any federal law issues.

> At this state of the proceedings Defendant is relying primarily upon Article I, Section 2 of the California Constitution because it does not want to have the federal court abstain from exercising jurisdiction. Defendant does not believe it is fair for the City to force it to give up a federally protected right and it declines to do so.

That left state law as the only possible basis for requiring a bond. The trial court ruled that no bond would be required as a matter of state law. Since no federal issues were raised, the trial court made no ruling based on whether a bond should have been required as a matter of federal law.

Manta's opposition to the petition for stay pending appeal did request a bond, and did not limit the request to state law, but it presented no evidence to support any amount of a bond. The court of appeal granted the stay without ever addressing the bond issue. Manta did nothing in response.

B. MANTA NEVER APPEALED THE DECISION NOT TO IMPOSE A BOND CONDITION

Although Manta asks this Court to decide whether a bond condition should have been imposed, Manta never raised that issue below. Again, the trial court's decision to grant a

preliminary injunction without imposing a bond condition was based entirely on California law. Manta appealed the merits of that decision but never once mentioned the bond issue. The court of appeal granted a stay without any mention of a bond condition. Manta did not seek reconsideration in the court of appeal and did not petition the California Supreme Court. As a result, there literally is no decision on this issue which this Court could review.

C. MANTA FAILED TO PRESENT ANY EVIDENCE TO SUPPORT AN INJUNCTION BOND CONDITION

A defendant who wants an injunction bond condition imposed has the burden of asking for that condition and the burden of submitting evidence to provide the court with evidence which would allow the court to determine the amount of the bond. A defendant who fails to do so waives any entitlement to an injunction bond condition and to any damages based on the preliminary injunction. See Doctors Associates, Inc. v. Stuart, 85 F.3d 975, 985 (2nd Cir. 1996); Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882-883 (9th Cir. 2003).

Manta never presented any evidence of likely harm and no evidence which would have allowed either court to determine the amount of a bond.

D. UNDER FEDERAL LAW, THERE IS NO LIABILITY FOR AN INJUNCTION EXCEPT TO THE EXTENT A BOND CONDITION WAS IMPOSED AND ACCEPTED

This portion of Manta's arguments misrepresent the law. At page 14 of its petition Manta baldy asserts that "traditionally a plaintiff who obtains a preliminary injunction but who later loses at trial has to pay the defendant for the damage caused by the preliminary injunction." At page 19 of its opinion Manta asserts that "with respect to preliminary injunctions absolute liability is the norm." Manta cites nothing to support either statement because settled federal law is just the opposite. It has been settled federal law for more than a century that the act of seeking a preliminary injunction or stay pending appeal is not a tort or wrongful act, and does not give rise to liability or damages, even if the court later rules that the preliminary injunction or stay should not have been granted. Under federal law, it is a wrongful act, and a potential ground for liability, only if the preliminary injunction or stay was sought in bad faith, or if the defendant can prove malicious prosecution.

However, courts do have the equity power to impose conditions when they grant preliminary injunctions or stays pending appeal. Any damages are based on the imposed and accepted conditions, not on the ground that it was a wrongful act to seek the preliminary injunction or stay. *The City*, not Manta, raised this issue in the courts below.

1. Asking a Court to Issue a Preliminary Injunction or Stay Is Not a Wrongful Act Unless Malicious Prosecution or Bad Faith Is Shown

For over a century federal cases have agreed that federal courts lack any power to award damages based on a preliminary injunction or stay unless (1) bad faith or malicious prosecution is proven or (2) the court requires an injunction bond as a condition of issuing the injunction. In addition to the cases cited below, see W. R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770, n. 14 (1983) ("A party injured by an injunction later determined to be erroneous has no action for damages in the absence of a bond"); Russell v. Farley, 105 U.S. 433, 437-438 (1881) ("Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit it may deem equitable and just"); Lawrence v. St. Louis-San Francisco Railway Co., 278 U.S. 228, 233 (1929) ("If it had not, when entering the interlocutory decree, required that bond be given, no damages could have been recovered on the dissolution of the injunction"); Benz v. Compania Naviera Hidalgo, 205 F.2d 944, 947-948 (9th Cir. 1953) ("in the absence of such a bond, there may be no recovery of damages for the issuance of a temporary injunction even although it may have been granted without just cause").

Under settled federal law, there is potential liability for a preliminary injunction or stay in the

absence of an injunction bond only if malicious prosecution or bad faith is alleged and proven. Coyne-Delany v. Capital Dev. Bd. 717 F.2d 385, 393 (7th Cir. 1983); International Association of Machinists and Aerospace Workers v. Eastern Airlines, Inc. 925 F.2d 6, 10 (1st Cir. 1991), cert. den. 502 U.S. 901 (1991).

2. If a bond condition is imposed and accepted, damages can be based on the acceptance of that condition

Under federal law, a court which imposes an injunction bond condition as a condition of obtaining a preliminary injunction or stay pending appeal has the power to order the plaintiff to comply with that condition and to pay the damages caused by the preliminary injunction or stay, up to the amount of the bond. Damages awarded on this basis are not awarded due to any tort or wrongful act, but as part of the court's equity power to impose a condition on the issuance of the preliminary injunction or stay and the plaintiff's acceptance of that condition.

If no bond condition is imposed, there is no basis for awarding damages, because the condition was never imposed or accepted. Similarly, if a bond condition is imposed and accepted, the amount of the injunction bond is a cap on permissible damages, because the amount of the bond is the extent of the condition imposed at the time the preliminary injunction or stay was issued. W. R. Grace, 461 U.S. at 770 ("A party injured by the issuance of an injunction later determined to be

erroneous has no action for damages in the absence of a bond"); Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167 (9th Cir. 1976), cert. den. 431 U.S. 903 (1977) ("It is a well-settled rule that there can be no recovery for damages sustained by a wrongful issuance of a preliminary injunction in the absence of a bond"); In re Ladner, 799 F.2d 1023, 1025-1026 (5th Cir. 1986) (no bond issued, so recovery denied); Cagan v. Mutual Benefit Life Ins. Co., 28 F.3d 654, 656 (7th Cir. 1993) (same); Mead Johnson & Co. v. Abbott Laboratories, 209 F.3d 1032, 1033 (7th Cir. 2000), cert. den. 531 U.S. 917 (2000) ("if the injunction is reversed, compensation for harm caused by the injunction cannot exceed the amount of the bond"); International Association of Machinists 925 F.2d at 10 (recovery limited to the amount of the bond); Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988) (same); Coyne-Delany, 717 F.2d at 393 (same).

A plaintiff who seeks a preliminary injunction or stay has no obligation to accept conditions a court imposes. Rather, if a federal court exercises its discretion to require a bond, the injunction bond is the "price of the injunction" and a plaintiff who considers that price too steep is free to decide not to post a bond and to forego the injunction or stay. Coyne-Delany, 717 F.2d at 394; Sprint Communications Company v. CAT Communications International, Inc., 335 F.3d 235, 240 (3rd Cir. 2003). The plaintiff's right to make that election arises at the time the bond condition is imposed, and a bond condition cannot be imposed retroactively after the preliminary

injunction or stay is dissolved. Mead Johnson, 209 F.3d 1033-1034.

3. No injunction bond condition was imposed or accepted

Since no bond condition was ever imposed, the City was never required to decide whether to accept such a condition.

Manta contends there is liability for damages simply because a defendant asks a court to impose a bond condition. Settled law rejects that contention. If no bond condition is not imposed and accepted, there is no basis for liability unless the defendant can show bad faith or brings a separate action for malicious prosecution. Buddy Systems, 545 F.2d at 1167; In re Ladner; Cagan. It is also settled that a plaintiff has a choice whether to accept or reject a bond condition at the time the preliminary injunction is issued; a bond condition cannot be imposed or increased retroactively. Coyne-Delany, 717 F.2d at 394; Sprint Communications Company v. CAT Communications International, Inc. (3rd Cir. 2003) 335 F.3d 235, 240; Mead Johnson, 209 F.3d 1033-1034.

4. Summary

Since the preliminary injunction was decided solely as a matter of California law, and since Manta never appealed the decisions not to impose a bond condition, the issue as Manta frames it is not properly before this Court.

However, settled federal law holds that requesting an injunction or stay is not a wrongful act, but a court can condition the injunction or stay on a bond. If the court chooses to impose that condition, the plaintiff has a choice whether to accept or reject that condition. If no bond is required, there is no basis for damages, and if the bond condition is accepted, the bond is the cap on damages. A bond condition cannot be imposed retroactively. Since no bond condition was ever imposed or accepted, there is no basis for damages without showing bad faith.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition should be denied.

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